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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-2067

BEVERLY CAMP SIMPSON,

Petitioner,

v.

JOHN G. SIMPSON, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOHN G. SIMPSON, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on March 8, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 490 F.2d 803 and is set out in the Appendix, *infra* at 1a. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 24, 1974. The denial is set out in the Appendix, *infra* at 15a. The district court directed a verdict for respondent, and a copy of the verdict is included in the Appendix, *infra* at 16a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1974. A timely petition for rehearing was denied on April 24, 1974. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. §§2510, 2511 and 2520, which create a civil cause of action in favor of "any person whose wire or oral communication is intercepted, disclosed, or used in violation of [§§2510-2520 of Title 18, United States Code]" against "any person who intercepts, discloses, or uses" such communication contain an unwritten exception which precludes a woman from suing her former husband for intercepting, using, and disclosing, without consent, her telephone conversations with third persons.

2. Whether the separate classification of and disabilities affecting married persons with respect to rights created by 18 U.S.C. §§2510-20 are violative of the fifth amendment of the Constitution of the United States.

Section 2403 of Title 28, United States Code, may be applicable. The courts below have not, pursuant to 28 U.S.C. §2403, certified to the Attorney General of the United States the fact that the constitutionality of an act of Congress was drawn in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Sections 2510 and 2511 of Title 18, United States Code, are set forth in their entirety in the Appendix,

infra at 17a-21a. Section 2520 of Title 18, United States Code states:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT OF THE CASE

The petitioner, Beverly Camp Simpson, was married to respondent John Simpson when the actions giving rise to this lawsuit occurred.[1] During their marriage, respondent surreptitiously and without petitioner's consent intercepted and recorded petitioner's conversations with third persons on a telephone located in their home.[2] Conversations between Mrs. Simpson and a man were intercepted which "were mildly compro-

[1] Unless otherwise indicated the facts are as stated in the opinion from which this appeal is taken, Appendix, *infra* at 2a.

[2] Mr. Simpson did not claim that any other party to the conversations gave him consent.

mising establishing that the other man was making advances, and that while the wife was resisting, she was not doing so in a firm and final fashion." *Simpson v. Simpson*, Appendix, *infra* at 2a.

Respondent then disclosed the contents of those conversations to neighbors and to the Simpson children, again without Mrs. Simpson's consent. As a consequence of respondent's actions, Mrs. Simpson consented to a divorce decree under which she obtained no alimony and which eliminated all of her child custodial rights and most of her property rights. Mrs. Simpson had been warned by an attorney, who also represented Mr. Simpson, that the tapes of her conversations "wouldn't look very good" if the divorce action were taken to court.[3]

Subsequent to the divorce, Mrs. Simpson filed suit for damages against her former husband alleging a violation of the provisions of 18 U.S.C. §§2510-2520. After listening to the evidence at trial, the district court directed the jury to return a verdict for Mr. Simpson ruling, as a matter of law, that a wife gives her consent to interception by her husband of her telephone conversations and that Alabama law prohibits a wife from suing her husband for a tort.

The court of appeals rejected the district court's reasoning, but affirmed the directed verdict by construing the wiretap statute to exempt from civil liability a husband who taps, records, and discloses, without consent, the telephone conversations of his wife with a third party. The court of appeals did not discuss or rule on the constitutionality of the wiretap statute

[3] See Transcript at 51-62.

as so construed, although the issue was raised by petitioner.

REASONS FOR GRANTING THE WRIT

I.

The limiting construction given the federal wiretap statute's civil liability provisions by the court of appeals conflicts with the express wording and legislative history of the statute, both of which encompass and prescribe civil sanctions for respondent's conduct.

Section 2520 of Title 18, United States Code, the civil liability provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, hereinafter referred to as "Title III," provides that "any person" who without consent intercepts, discloses or uses the wire communications of any other person is subject to civil liability. It is clear that this liability should be construed broadly and without implied exceptions.

Judicial construction of Section 2520, like any other statute, "must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). As defined by Title III, "person" includes "any individual." 18 U.S.C. §2510 (6). In defining the criminal violations which may form the grounds for a civil suit, §2511 provides, "*Except as otherwise specifically provided in this chapter* any person who (a) willfully intercepts . . . any wire or oral communication" is subject to the Act's criminal sanctions. (Emphasis added.) No provision of Title III expressly provides or even suggests that spouses, when spying on

each other by the means proscribed by the Act, are immune from its provisions. In fact, the court of appeals conceded that "[t]he naked language of Title III, by virtue of its inclusiveness reaches this case." Appendix, *infra* at 5a.

The court of appeals' limited interpretation of the words "individual" and "person" is also inconsistent with the broad definition given these terms in judicial constructions of the statutory precursor to Title III. *See, e.g., Weiss v. United States*, 308 U.S. 321, 328-29 (1939); *Lee v. State of Florida*, 392 U.S. 378, 381, n. 5 (1968); *Nardone v. United States*, 302 U.S. 379, 382-83 (1937).[4] *See also, United States v. Gris*, 247 F.2d 860 (2d Cir. 1957); *Huff v. Michigan Bell Telephone Company*, 278 F. Supp. 76 (E.D. Mich. 1967); and *United States v. Gruber*, 39 F. Supp. 291, 294 (S.D.N.Y. 1941). The interpretation is also at variance with the decision of the Florida Supreme Court in *Markham v. Markham*, 272 So. 2d 813 (Fla. S. Ct. 1973), which held that married persons were included in the protection afforded all persons under a state wiretap statute. The Florida Supreme Court relied on state law prohibitions on interception of wire communications "when none of the parties to the communications has consented," and held that a married woman was entitled to the protection of the statute to prevent her husband from dis-

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[4] The United States argued that the words "no person" used in 47 U.S.C. §605 did not include federal agents. This Court held that the plain words and clear language of the statute included federal agents even though the legislative history of the Act did not show that the activities of federal agents were intended to be circumscribed; "these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute." Nardone v. United States, 302 U.S. 379, 382-83 (1937).

closing in a divorce proceeding the contents of her illegally intercepted telephone conversations.

Furthermore, as the court of appeals conceded, the legislative history of the statute reveals an intent to prohibit "all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers." Appendix, *infra* at 7a, citing Senate Judiciary Committee, Senate Report No. 1097, 1968 U.S. Code Cong. & Admin. News 2112, 2153 (hereinafter "Senate Report"). The court of appeals even noted legislative discussion which was concerned with wiretapping in marital disputes. Appendix, *infra* at 10a, n. 13 and 14. Nevertheless, the court of appeals hesitantly concluded that "Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts." Appendix, *infra* at 5a.

Although there was admittedly relatively little debate about wiretapping between spouses in the legislative record, taken in its entirety, it is more congruous and logical to interpret the absence of debate as an indication that there was simply no dispute about the fact that Congress was of a single mind in desiring Title III to reach every single situation that its "naked language" described, including petitioner's. "Everyone agrees that private wiretapping or eavesdropping should be prohibited . . . domestic relations, industrial espionage and counterespionage, information obtained for civil litigation are all fertile fields for those who traffic in other people's privacy. Title III takes care of this. . . ." Sen. Fong, 114 Cong. Rec. 14747 (May 23, 1968).

Although there is no extensive legislative discussion of the civil liability provision, 18 U.S.C. §2520, it is

clear that it was intended, along with other sections of Title III,[5] to make the prohibition on private wiretapping, including that between spouses, an effective one. See Senate Report at 2156. The civil remedy was intended to be both "comprehensive" and "exclusive," but would not necessarily preempt "parallel" State remedies. *Id.* at 2196.

In spite of the language and history of Title III, the court of appeals incorporated what amounts to a doctrine of interspousal immunity into the federal wiretap statute. Throughout its opinion the appellate court reveals its fear that, if applied as written, the federal wiretap statute would create "a federal remedy for persons aggrieved by the personal acts of their spouses within the marital home." Appendix, *infra* at 5a. Yet, in spite of its fear, the court conceded that Title III does in fact provide a federal remedy for persons so aggrieved, although admittedly a more limited remedy than the one argued for by petitioner, *i.e.*, had respondent procured a third party to tap and record his wife's telephone conversation, petitioner would have had civil recourse against the third party, notwithstanding her husband's authorization and instigation of the intrusion upon her privacy. Appendix, *infra* at 11a. Furthermore, the court of appeals never hinted that respondent would not be liable to third persons whose conversations with his former wife were overheard.

The result reached by the court is anomalous since

[5] Section 2512 of Title 18, United States Code, prohibiting the manufacture or distribution of wiretapping devices; 18 U.S.C. §2513, providing for the confiscation of such devices; 18 U.S.C §2515, prohibiting the use of intercepted wire communications in court proceedings.

the availability of a federal civil remedy to a spouse whose mate has violated Title III is now to turn upon a narrow, technical distinction of fact, specifically whether the offending mate procured a third party to do the spying. This does not alter the substance of the intrusion upon his or her spouse's privacy, particularly where, as here, the recordings, made by respondent alone, were disclosed to others deliberately to embarrass the petitioner and used to coerce her agreement to terminate the very relationship which the court of appeals held to bar petitioner's suit for damages. It is hard to imagine how respondent's use of a third party could have increased the gravity of the harm done.

On its face, the language of 18 U.S.C. §2520 reveals that Congress considered personal as well as procured interception of communications to be equally offensive, since it provided for a civil cause of action against "any person who intercepts, discloses or uses, *or procures any other person to intercept, disclose or use* such communications." (Emphasis added.) 18 U.S.C. §2520. To say, as the court of appeals did, that "a third party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of much greater magnitude," Appendix, *infra* at 11a, ignores the obviously equal footing on which the offenses are placed by the statute. It is a gross distortion of this statutory language to interpret it as evidencing Congressional intent that a spouse can sue a third party for intercepting or disclosing his or her conversations at the other spouse's instigation, but cannot sue the spouse who procured the third party.

Even if the third-party intrusion is conceived of as a more grievous offense, the foregoing language makes

it clear that Congress intended a procuring party to be fully as liable as the one who is procured, or one who operates alone. The proper construction of the statute which naturally follows is that the language regarding procurement was specifically inserted because Congress was cognizant that domestic relations snooping constitutes a significant portion of the business of private investigators. The legislative history quoted in footnotes 13 and 14 of the court of appeal's opinion therefore supports the interpretation that Congress did in fact intend to give spouses a cause of action against each other for violations of Title III. If the language regarding procurement so inevitably reaches spouses, then it is impossible to conclude that 18 U.S.C. §2520 contains an implied interspousal immunity when a spouse personally engages in the prohibited activities.

There is no generally applicable "federal law of domestic relations" which can be superimposed upon the federal wiretap statute to bring about the result reached by the court of appeals. *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956).[6] Nor has Congress authorized resort

[6] Although this Court at one time did recognize the doctrine of interspousal immunity in Thompson v. Thompson, 218 U.S. 611 (1910), it did so only in construing a statute of the District of Columbia. Those statutes are construed in light of the common law of the state of Maryland. In re Estate of Parnell, 275 F. Supp. 609 (D.D.C. 1967). Moreover, this Court has rejected the idea that medieval perceptions of the status of husband and wife will be thoughtlessly incorporated into federal law. In United States v. Dege, 364 U.S. 51 (1960), a husband and wife were charged with unlawful conspiracy under 18 U.S.C. §371. The argument was made that there could be no conspiracy to which the criminal law applied because at common law the husband and wife were considered to be one person. This Court rejected that argument over a dissent which urged the Court not to presume that Congress had intended to ignore a long-standing rule of common law.

to state domestic law to define the extent of the remedy set forth in Section 2520.[7]

> . . . [A]lthough Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, *the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law. Moor v. County of Alameda*, 411 U.S. 693, 701 (1973). (Emphasis added. Footnote omitted.)

In the absence of specific Congressional authorization this Court has applied the law of a particular state to federal statutes only when necessary to fill in gaps in the substantive federal law. *See, e.g., DeSylva v. Ballentine, supra* (California statutory law applied to determine rights of an illegitimate child under the federal Copyright Act, 17 U.S.C. §24, which gave "children" of a deceased copyright holder a right to renew the copyright). It should be emphasized that in such situations the law of a particular state is always chosen as the applicable law. Judicial resort to state law to aid construction here would result in a recognition of petitioner's right to sue her former husband under Alabama law, because the laws of the State

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[7] Compare 18 U.S.C. §2511 (2) (d). It is clear that this Section authorizes reference to the law of a *particular state* when one party to a conversation has consented to interception. For §2511 (2) (d) to apply to the facts before this Court, the Court would have to rule that a wife gives consent, as a matter of law, to interception of her telephone conversations by her husband, a position rejected by the court of appeals. Appendix, *infra* at 4a, n. 3.

of Alabama do not provide for interspousal immunity.[8] *Bonner v. Williams*, 370 F.2d 301, 304 (5th Cir. 1966); *Penton v. Penton*, 233 Ala. 282, 135 So. 481 (1931). The "majority" rule of interspousal immunity referred to by the court of appeals would be irrelevant.

The appellate court did not purport to rely on one state's law. Instead, it fabricated a uniform, non-congressionally authorized standard for interpreting the civil liability provisions of the wiretap statute. At the same time, however, it implicitly rejected the notion that there is a federal interest in having uniform standards for civil liability in this situation, for it specifically professed to keep Congressional enactments from extending inadvertently into "areas normally left to states, those of the marital home and domestic conflicts." Appendix, *infra* at 5a. The paradox is that the decision of the court of appeals enforces a doctrine of interspousal immunity in a state which has refused to recognize that doctrine.[9]

[8] For the same reason, were either 42 U.S.C. §1988 or Rule 17(b), Fed. R. Civ. P., considered to incorporate state law into Section 2520 of the federal wiretap statute, petitioner would be entitled to maintain her suit against respondent. Section 1988 of Title 42, U.S.C. provides that only the common law of the state in which the court having jurisdiction of the cause of action is held is to be applied, and then only to supplement deficient federal remedies. Rule 17 (b) states that the "capacity of an individual . . . to sue or be sued shall be determined by the law of his domicile." Both petitioner and her former husband were and are domiciliaries of Alabama which has rejected the doctrine of interspousal immunity.

[9] *Cf.*, United States v. Yazell, 382 U.S. 341, 352-353 (1966), in which this Court refused to fashion a federal law of contracts which would bypass the defense of coverture recognized by the State of Texas:

> Each State has its complex of family and family-property arrangements. . . . Clearly, in the case of these SBA loans

The interpretation given the federal wiretap statute by the court of appeals violates established principles of statutory construction. Because it found comparatively few references to the prohibition of wiretapping in the domestic setting, it inferred a congressional intent to preclude civil liability between spouses. The resultant exception to Section 2520 is inconsistent with the broad prohibitive intent of the entire wiretap statute and, as shown *infra*, is of doubtful constitutionality.

II.

If the court of appeals correctly construed the statute to exclude interspousal civil suits for violations of the statute as a matter of uniform federal law, this Court should then consider whether the different treatment thereby accorded married persons is constitutional when judged by fifth amendment standards.

The refusal by the court below to allow a married person civil recourse against his or her spouse under Section 2520 apparently stems from a reluctance to deviate from what the court perceived as a traditional and "majority" doctrine of interspousal immunity. The constitutionality of the denial of the civil remedies of Section 2520 simply because of a person's marital status must be judged by questioning whether such a classification has any appropriate relationship to any proper

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there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.

governmental objective. *Bolling v. Sharpe*, 347 U.S. 497 (1954).[10]

This Court has on numerous occasions reaffirmed that the right to marry is a basic and fundamental right protected by the constitution. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). If the court of appeals' construction of the federal wiretap statute is allowed to stand, it will have the effect of penalizing the exercise of that right by making the marriage ceremony an involuntary renunciation of the statutory protection against certain forms of invasion of privacy. Such a penalty requires justification by a compelling governmental interest, *Dunn v. Blumstein*, 405 U.S. 330, 339-340 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), or at least must have a "fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

No rational basis and certainly no compelling governmental interest exist which would justify the discriminatory treatment of married people sanctioned by the court of appeals. The effect of the opinion below is to establish a doctrine of interspousal immunity, and because the court of appeals was concerned lest it "override

[10] The fourteenth amendment would be relevant if Section 2520 were construed to incorporate the state law of Alabama, and if Alabama law were held to apply interspousal immunity to civil actions under the federal wiretap statute. Petitioner takes the position that interspousal immunity has been abolished in Alabama for all purposes. See *supra* at 11-12. If this type of action is an exception, the irrationality of applying the doctrine here would be compounded since there can be no rational reason for distinguishing between a spouse's civil liability for assault and battery as opposed to an intentional violation of the right to privacy or 18 U.S.C. §2520.

the interspousal immunity for personal torts accorded by the majority of states," Appendix, *infra* at 5a, n.7, it is pertinent to examine the reasons behind that doctrine. Petitioner contends that its application furthers no rational, legitimate or compelling governmental objective in the context of civil liability under the federal wiretap statute.

In his comments on the English common law, Blackstone makes no reference to a rule of interspousal immunity.[11] His discussion of the legal status of husband and wife only reveals that a woman acquired certain legal disabilities as a consequence of her marriage which led to the generalization that her individual legal existence was suspended and merged in that of her husband.[12]

Two of the disabilities of a married woman were the loss to her husband of her property rights and her incapacity to sue or be sued alone. These disabilities merely made it a practical impossibility for spouses to sue each other. If a married woman wanted to sue her husband, she would have to join him as a plaintiff in

[11] Blackstone, Commentaries on the Laws of England, Part II, at 441-445 (Tucker ed.) (hereinafter "Blackstone").

[12] Most courts adhere to this generalization in justifying a doctrine of interspousal immunity. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Paiewonsky v. Paiewonsky, 446 F.2d 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

It should be observed, however, that the perception of the husband and wife as one legal entity was disregarded in certain civil matters, and was disregarded by the common law in criminal matters. Courts of equity recognized to some extent the separate existence of husband and wife. Johnson, J., Sex and Property, 47 N.Y.U.L. Rev. 1033, 1052-55 (1972); McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1035 (1929). Blackstone notes that the ecclesiastical courts permitted a wife to sue or be sued alone. Blackstone at 442, 444.

an action against himself as defendant. Because of the wife's incapacity to be sued alone, a husband would have to be joined as a defendant in any suit brought against his wife. In either case, the result was a nullity because of the property laws. In the first instance, any award of damages which the wife received from her husband would belong to him. In the second instance, a husband's seeking damages from his wife was an exercise in futility because he already owned or had control of her property and income.[13]

Thus, a substantive immunity from civil liability for interspousal torts did not exist at common law. There was only a procedural inability created by the husband's appearance as both plaintiff and defendant in any suit between him and his wife, and an impracticability, common to both spouses, of bringing suit for damages under the existing property laws.

Petitioner does not dispute the fact that at some point a substantive doctrine of interspousal immunity appeared. The current justification for the doctrine's continued vitality is usually either the preservation of domestic harmony [14] or the prevention of fraudulent and collusive suits founded on torts which are insurable

[13] *See* Ewald v. Lane, 104 F.2d 222 (D.C. Cir.), *cert. denied*, 308 U.S. 568 (1939), for judicial recognition of these procedural and property law difficulties.

[14] *See, e.g.*, Paiewonsky v. Paiewonsky, 446 F.2d 178 (3rd Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); Jones v. Pledger, 363 F.2d 986 (D.C. Cir. 1966); Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Thompson v. Thompson, 218 U.S. 611 (1910). *See also*, 41 C.J.S. Husband & Wife §396. This reason is questionable in view of the fact that courts have long permitted suits between spouses over property interests which have the same potential for disrupting domestic felicity as suits over personal torts. *See* McCurdy, *supra* at 1038, 1052.

and insured. Neither of these considerations is served by grafting a federal doctrine of interspousal immunity onto 18 U.S.C. §2520.

It is self-evident that there is very little in the way of domestic harmony left to preserve if one spouse has found reason to resort to the surreptitious use of bugs or wiretaps to uncover communications of the other spouse. The context in which this civil suit arose is an excellent example of the irrationality of trying to preserve marital felicity by barring suits between spouses. Suit was brought only after the dissolution of the marriage for illegal conduct which had as its immediate, if not intentional, effect the disruption of the marriage. As for the prevention of collusive suits against insurance companies, they are not possible where, as here, such companies are not permitted to extend coverage for criminal acts which also give rise to civil liability. *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U.S. 234, 246 (1911).

Privacy extends to individuals *qua* individuals, and not to single people as individuals and married people as a unit. The construction of Title III which gives less protection to married persons' privacy than to that of single persons because it restricts their right to civil damages can be justified by no compelling, substantial or rational governmental interest.

This Court should not assume that Congress intended to recognize a statutory exemption from civil liability under the federal wiretap statute which does not even marginally serve to protect a legitimate governmental interest. If this Court does find that the statutory exclusion discussed herein was intended, however, petitioner submits that the exclusion cannot be sustained under constitutional standards.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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APPENDIX

APPENDIX

Beverly Camp SIMPSON,
Plaintiff-Appellant,

v.

John G. SIMPSON, III,
Defendant-Appellee.

No. 73-1521

**United States Court of Appeals,
Fifth Circuit**

March 8, 1974.

[Syllabus]

From a determination of the United States District Court for the Northern District of Alabama, Seybourn H. Lynne, J., in a suit by former wife for civil damages against former husband who used wiretap to intercept wife's conversations in marital home, the former wife appealed. The Court of Appeals, Bell, Circuit Judge, held that wire interception provisions of Omnibus Crime Control and Safe Streets Act of 1968 did not apply to interception by husband of wife's conversations in marital home.

Affirmed.

Appeal from the United States District Court for the Northern District of Alabama.

Before BELL, COLEMAN and RONEY, Circuit Judges.

BELL, Circuit Judge:

The issue presented on this appeal is the scope of the wire interception provisions of the Omnibus Crime Con-

trol and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510–2520. Is the interception by a husband using electronic equipment of the conversations of his wife with a third party over the telephone in the marital home included in the statutory proscription? The context in which we must address this issue is a suit by the wife for civil damages against the husband, pursuant to Section 2520. The district court answered in the negative and we affirm, although the language and legislative history of the Act leaves the question in considerable doubt.

THE FACTS

Harboring uncertainties as to his wife's faithfulness, appellee obtained a device for tapping and recording telephone conversations. He attached the device to phone lines within his home, and thereby intercepted conversations between his wife and another man. The conversations were mildly compromising establishing that the other man was making advances, and that while the wife was resisting, she was not doing so in a firm and final fashion. Convinced that he had "caught her," appellee played the tapes, or portions thereof, to various neighbors and family members. He also played them for a lawyer, on whose advice the wife agreed to an uncontested divorce.

After the divorce appellant brought this action. Failing below, she has appealed, arguing before this court that her claim is bolstered by constitutional protections of privacy and emerging concepts of women's rights. We take a more pedestrian view of the case, and are of the opinion that it involves nothing more nor less than statutory construction. If Congress intended to extend

such a remedy to persons in her position, appellant prevails; if it did not, she fails. This being the case, we turn to the statute and its history.

TITLE III

Title III of the Omnibus Act broadly prohibits the interception[1] or disclosure of a wire communication,[2] subject to stated exceptions which are not relevant to this case.[3] Violators are subject to criminal penalties of up to

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[1]18 U.S.C.A. § 2510(4) & (5):

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal. . . ."

[2]18 U.S.C.A. § 2510(1):

"(1) 'wire communication' means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications; . . ."

"Paragraph (1) defines 'wire communication' to include all communications carried by a common carrier, in whole or in part, through our Nation's communications network. The coverage is intended to be comprehensive." Senate Judiciary Comm., Senate Report No. 1097, 1968 U.S.Code Cong. & Admin.News, pp. 2112, 2178.

[3]See 18 U.S.C.A. § 2511(2) & (3):

The district court seems to have placed some reliance on the exception contained in § 2511(2)(d):

$10,000 or five years.[4] They are also civilly liable to

"It shall not be unlawful under this chapter [§§ 2510–2520 of this title] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

We think this inapposite for two reasons. First, the exemption requires consent of a "party to the communication," and " 'party' would mean the person actually participating in the communication." Senate Judiciary Comm., Senate Report No. 1097, 1968 U.S.Code Cong. & Admin.News, pp. 2112, 2182.

Second, even if we were to hold that the husband is capable of consenting for the wife, or that the wife's use of the marital home's phone implied consent to be overheard by the husband, the consent would be vitiated by the purpose of committing an "injurious act." See 114 Cong.Rec. 14694 (1968), where this proviso is stated to reach consensual recordings "made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him."

[4] 18 U.S.C.A. § 2511(1):

"(1) Except as otherwise specifically provided in this chapter [§§ 2510–2520 of this title] any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication. . . .

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both."

persons whose communications they intercept or disclose.[5]

The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts.[6] We reach this decision because Congress has not, in the statute, committee reports, legislative hearings, or reported debates indicated either its positive intent to reach so far or an awareness that it might be doing so. Given the novelty of a federal remedy for persons aggrieved by the personal acts of their spouses within the marital home,[7] and given the severity of the remedy seemingly provided

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[5]18 U.S.C.A. § 2520:

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter [§§ 2510–2520 of this title] shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter [§§ 2510–2520 of this title] or under any other law."

[6]We have no doubts, however, that Congress has the power to legislate the result sought by appellant, under its authority to control interstate commerce.

[7]We note that not only would the result sought by appellant create a federal remedy for marital grievances, it would also override the interspousal immunity for personal torts accorded by the majority of states. Discussions of the rules followed by the various states may be found at Clark, The Law of Domestic Relations, 252–56 (1968), and Prosser, The Law of Torts, 861–64 (4th ed. 1971).

by Title III, we seek such indications of congressional intent and awareness before extending Title III to this case.

Our independent search of legislative materials has been long, exhaustive, and inconclusive. To summarize the results, we have found no direct indications that Congress intended so much, and only several scattered suggestions that it was aware that the statute's inclusive language might reach this case. In support of this general statement, we now turn to a specific discussion of the statute and its history.

An initial observation about Title III is that it is a part of a crime control act. In the Omnibus Act Congress sought generally to strengthen the position of law enforcement officials, *see* Senate Judiciary Comm., Senate Report No. 1097, 1968 U.S.Code Cong. & Admin.News, p. 2112.[8] Further, the Senate report states that, "The major purpose of title III is to combat organized crime." *Id.* at U.S.Code Cong. & Admin.News 1968, p. 2157. Five of Title III's eleven sections deal almost exclusively with procedures for utilizing electronic surveillance against criminal activities, 18 U.S.C.A. §§ 2514, 2516–2519, and its principal goal is surveillance standards that satisfy the constitutional requirements of Berger v. New York, 1967, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, and Katz v. United States, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. See *Senate Report*, pp. 2161–2163.

Be this as it may, Title III also was intended to protect individuals against invasions of their privacy by sophisticated surveillance devices. *Senate Report*, p. 2153. Thus,

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[8]Hereinafter cited as *Senate Report.*

the Senate report introduces its section on the "Problem" with the following paragraph:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at U.S.Code Cong. & Admin.News 1968, p. 2154. The report further states that, "To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers. . . ." *Id.* at U.S. Code Cong. & Admin.News 1968, p. 2153. The nature and breadth of Congress's response to private surveillance is fairly indicated by the Senate report's section entitled "Prohibition," quoted in full in the margin.[9]

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[9]"Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforce-

For our purposes it must be pointed out that we have herein quoted virtually every phrase of the report's text dealing with private surveillance—amounting to less than one of the ten pages about Title III, the balance concerning electronic surveillance by law enforcement officials. Not only does the report, like the act, focus on crime control, but it also contains no clear indication that Congress intended to intrude into the marital relation within the marital home. We thus have considered it necessary to consult the extensive legislative hearings on the subject, the better to gauge Congress's intent and awareness.[10]

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ment agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising of intercepting devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation."

Senate Report, U.S.Code Cong. & Admin.News 1968, p. 2156.

[10]Our research has involved the following hearings:

I. Hearings on Wiretapping, The Attorney General's Program, Before the Senate Judiciary Comm., 87th Cong., 2d Sess. (1962).

II. Hearings on Invasions of Privacy, Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm., pts. 1–6, 89th Cong. (1965–1966).

III. Hearings on Criminal Laws and Procedures, Before the Subcomm. on Criminal Laws & Procedures of the Senate Judiciary Comm., 89th Cong., 2d Sess. (1966).

IV. Special Inquiry on Invasion of Privacy, Before the Special Subcomm. on Invasion of Privacy of the House Gov't Operations Comm., 89th Cong., 1st Sess. (1965).

V. Hearings on the Right of Privacy Act of 1967, Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary

The impression left by these hearings is similar to that produced by the report—the focus was official use of surveillance devices, with little explication of how far the private prohibition should extend. This is strikingly true of the hearings immediately preceding passage of Title III. While there are occasional references to the fact that the bill would prohibit private use of electronic surveillance techniques,[11] there are no substantive discussions of the probable or desired reach of the prohibition. Earlier hearings also accorded little attention to private users. For example, we have found in Sen. McClellan's 1966 hearings only three relevant sentences.[12] Similarly, of Sen.

Comm., pts. 1 & 2, 90th Cong., 1st Sess. (1967).

VI. Hearings on the Anti-Crime Program, Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. (1967).

VII. Hearings on Controlling Crime Through More Effective Law Enforcement, Before the Subcomm. on Criminal Laws & Procedures of the Senate Judiciary Comm., 90th Cong., 1st Sess. (1967).

Citations to those hearings will be by the appropriate Roman numeral. E. g., the hearings on the Right of Privacy Act of 1967 will be cited as *Hearings* # V.

[11]For example:

Congressman McClory: "I am talking about a device being put on by an official, by the police department, because we are opposing in this legislation and all legislation, any private eavesdropping." *Hearings* # VI, at 956 (see note 10, *supra*).

In the same hearings, at 1045, Prof. G. Robert Blakey noted that the "two major private uses" of electronic surveillance equipment were in commercial eavesdropping and "domestic relations investigations." He made a similar comment at *Hearings* # V, pt. 2, at 413.

[12]Sen. McClellan (describing a bill similar to Title III: "This bill outlaws all private wiretapping."

Hearings # III, at 2 (see note 10, *supra*).

Sen. McClellan (addressing Sen. Edward V. Long, who was testifying about the hearings on the subject previously held by his Subcommittee on Administrative Practice & Procedure):

"Then you agree with me that we should make this law as strong as possible, and go as far as it is possible to go, to absolutely outlaw it, except in such cases as Congress may, in its wisdom, permit wiretapping under orders of a Court in certain rather exceptional cases as a matter of necessity in law enforcement."

Long's six-part 1965–1966 hearings, four parts dealt exclusively with government surveillance, and one with "service observing" by telephone companies; Part 5 dealt in part with private use,[13] although much of it concerned government surveillance practices.

Of what testimony there was about private surveillance, only a minor portion was with reference to the marital setting. The only relevant passages which we have found, in hearings stretching over five years, are set forth in the margin.[14] It should be noted that the concerns and in-

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Sen. Long:

"Let me say this. I agree with you entirely that there should be a very, very strict law prohibiting wiretapping."

Id. at 79.

[13]Sen. Long:

"The three large areas of snooping in this [non-governmental] field are (1) industrial, (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these three areas. If any justification exists, we will probably hear about it in the next few weeks as we expect to explore this terrain thoroughly." *Hearings* # II, pt. 5, at 2261 (see note 10, *supra*).

[14]The following is from an article entitled "Is Big Brother Taping You?", by Arthur Whitman, from Tape Recording, Feb. 1965, reprinted in *Hearings* # II, pt. 1, at 18 (see note 10, *supra*):

"Individuals involved in civil suits bug each others' premises to gather useful information and evidence. The prime area for this is divorce actions, particularly in states with restrictive codes. So little is sacred in this line of endeavor that bugs are routinely discovered under the beds of estranged husbands and wives who suspect each other of errant ways. The latest twist in this game is the installation of tiny radio transmitters in cars that relay to prying ears and tape recorders any conversations or other sounds produced by drivers and passengers."

Richard Gerstein, Dade County District Attorney:

"Nonetheless, it is routine procedure in marital disagreements and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones."

Hearings # II, pt. 2, at 1009 (see note 10, *supra*).

Bernard Spindel, private investigator/electronic technician (explaining the 10% of his work that he refers to as the "affirmative, defensive type of eavesdropping"):

formation in these passages are primarily directed towards the involvement of private investigators in marital conflicts. Indeed, were appellant seeking to recover from a third party, we could not, on the basis of this legislative history, accept the defense that the interceptions were authorized by the husband. However, to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse. The latter, it seems to

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"In other words, it is restricted to defense in the sense that a man believes that there is some wrongdoing within his own premises; we will help him electronically obtain the evidence of such wrongdoing. But it is restricted within the confines of the law and within a man's own home or premises, where he has absolute control, whether it be his office or his home or his factory."
Id., pt. 5, at 2262.

Ben Jamil, president of a firm which sold significant quantities of electronic surveillance equipment to persons other than public officials and licensed private investigators:

"I don't feel, however, that I am in any position to judge the rightness or wrongness of this mother eavesdropping on her daughter with one of my devices. Any more than I have the right to determine whether a suspicious husband or wife is entitled to snoop on his or her mate, a businessman is within his rights to determine whether an employee is guilty of pilferage. . ."
Id. at 2365.

John W. Leon, a private investigator, noted that 80% of his domestic work involved husbands spying on wives. He described the "10-day blitz," named for the fact that if it uncovers nothing within ten days you may as well forget the theory that your spouse is playing around. The blitz includes telephone taps, car and room bugs, voice-activated tape recorders, and an automatic camera, all of which could be purchased for private use for $400. He testified that previously he would have employed the devices himself for a client, but no longer did so because of F.C.C. regulations.

When questioned about the ethics of these practices, he replied:

"[W]e have found statistically that once the truth is out in any domestic squabble, there is a 50% better chance of a couple being reconciled. Every time we make a case, I practically feel like a surgeon who is cutting out a cancer."
Id. at 2411.

us, is consistent with whatever expectations of privacy spouses might have vis-a-vis each other within the marital home.[15]

When we narrow our search to material relevant to this ultimate issue, that of whether Congress intended its regulations to invade the realm of personal acts within the marital home, we find very little indeed. We think that only two passages support appellant's case, these being the testimony of Ben Jamil and John W. Leon, quoted in note 14. These statements suggest congressional awareness that private individuals were using electronic surveillance techniques within their own homes. However, they do not support the proposition that Congress was concerned that such activities took place.[16]

OTHER CONSIDERATIONS

Given this inconclusive legislative history, we think two other factors are important. First, it is clear that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension phone in the family home—subsection (5)(a)

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[15]We are aware that there is no statutory requirement of an expectation of privacy in wire communications. Compare § 2510(1), note 2, *supra*, with § 2510(2):

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . ."

We are here noting only that it is a large jump from a prohibition on third-party surveillance to one on personal spousal surveillance.

[16]We have also searched congressional debates, but without finding any comments sufficiently relevant to merit printing here. See 114 Cong.Rec. 12280–84, 12294–98, 12982–13000, 14469–86, 14693–751, 16274–98 (1968).

(i) of section 2510 directly covers this point.[17] If there is a convincing distinction between this clearly acceptable overhear and the overhear accomplished by appellee, we fail to see it. In fact, we think the (5)(a)(i) exemption is indicative of Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other.

Second, we note that not only does Title III have the primary goal of controlling crime, but that it also prescribes criminal sanctions for its violators. That is, if appellant prevails here then appellee is subject to severe criminal penalties, assuming of course that the prosecution could meet the higher standards of proof required for criminal convictions. We thus are bound by the principle that criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed. *See* Kordel v. United States, 1948, 335 U.S. 345, 349, 69 S.Ct. 106, 109, 93 L.Ed. 52, 56. We consider this basic due process principle to be of considerable importance in this case, in light of our own inability to determine from the statute and its legislative history whether one is pro-

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[17]See note (1), *supra.*

The meaning of the phrase "being used by the subscriber or user in the ordinary course of its business" becomes clear in light of objections to the original version, which did not contain this phrase. Prof. Herman Schwartz, appearing for the A.C.L.U., stated his fear that the original version would permit intruders or other unauthorized persons to use extension phones without being subject to the prohibitions and penalties of the act. In the course of this objection, he made the following comment:

"I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem . . .

But this bill does not go to that and goes beyond that." *Hearings* # VI, at 989 (see note 10, *supra*).

hibited from tapping one's spouse's conversations within one's own home.

CONCLUSION

As should be obvious from the foregoing, we are not without doubts about our decision. However, we have concluded that the statute is not sufficiently definite and specific to create a federal cause of action for the redress of appellant's grievances against her former husband. Our decision is, of course, limited to the specific facts of this case. No public official is involved, nor is any private person other than appellee, and the *locus in quo* does not extend beyond the marital home of the parties.

Affirmed.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

April 24, 1974

TO ALL COUNSEL OF RECORD

Re: No. 73-1521 — Beverly Camp Simpson v.
John G. Simpson, III

Gentlemen:

This is to advise that an order has this day been entered denying the petition ( )for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By s/ SUSAN LEBRUN
Deputy Clerk

cc: Mr. Robert Sellers Smith
Ms. Emily Carssow
Mr. Glenn F. Manning

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

Civil Action
File No. 72-331

BEVERLY CAMP SIMPSON,
Plaintiff

VS.

JOHN G. SIMPSON, III,
Defendant

JUDGMENT

This action came on for trial before the Court and a jury on the 13th day of November, 1972, Honorable Seybourn H. Lynne, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, on this the 14th day of November, 1972

It is Ordered and Adjudged upon verdict of the jury this day filed this 14th day of November, 1972 at the direction of the court finding for the defendant as follows:

> "We, the jury, find for the defendant, John G. Simpson, III, that the plaintiff, Beverly Camp Simpson, take nothing and that the defendant, John G. Simpson, III, go hence without day with respect to this case; and taxing costs against the plaintiff.

Decatur, Alabama
Filed: November 14, 1972

William E. Davis, Clerk
By: s/ GENE E. BELL
Deputy Clerk

William E. Davis, Clerk
By: s/ GENE E. BELL
Deputy Clerk

Title 18, United States Code:

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its busi-

ness; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 112.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 213.